

THE FEDERAL MARITIME COMMISSION
800 North Capitol Street, NW, Washington, D.C.

D. F. YOUNG, INC., Complainant, v. NYK LINE (NORTH AMERICA) INC., Respondent.

DOCKET NO. 16-02

RESPONDENT'S MOTION TO AMEND
ITS ANSWER

A. RELIEF REQUESTED BY THIS MOTION

Respondent moves for leave to serve an amended answer in the form attached to this motion.

B. RULE 502.71(a) STATEMENT

As reported in Part VI of the Parties August 19, 2016 Joint Status Report:

Respondent intends to move early next week to amend its Answer to the Complaint. Based on the draft of such motion provided by Respondent, Complainant does not consent to Respondent's requested amendment.

C. NATURE OF THIS CASE

This is a claim for unpaid freight forwarder compensation. Complainant is a licensed freight forwarder. Respondent is sued as common carrier of goods by water. Complainant has supplemented its alleged damages to \$461,000.00.

D. HISTORY OF THIS CASE

1. The Docket Sheet shows:

- 01/29/2016: Verified Complaint filed.
 - 03/08/2016: Verified Answer filed.
 - 03/24/2016: Order Establishing Discovery Deadlines
 - 05/26/2016: Order Amending Discovery Deadline to September 16, 2016.
2. There has been voluminous documentary discovery.
 3. One witness from each of Complainant and Respondent has been deposed. Up to ten more party and non-party depositions are contemplated including three to six nonparty depositions during August 24-26 in Detroit.

E. AUTHORITIES RELIED ON IN THIS MOTION

1. Rule 66(a) [46 C.F.R. 502.66] provides in relevant part:

Amendments or supplements to any pleading (complaint, Order of Investigation and Hearing, counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding officer.
2. *Tak Consulting Engrs. V. Bustani*, 1998 WL 940845, at *7-8 (F.M.C. Oct.22, 1998) (Pleadings in administrative proceedings are easily amendable, even more so than in federal courts, and are not considered to be critically important. Rather they are general notice-giving instruments that allow respondents to prepare their defense.)

3. *Barbeau v. M. Anderson, etc.*, 1991 WL 382895, at *2 (F.M.C. May 16, 1991) (FMC Rules governing amendments are flexible and amendments are liberally allowed).)
4. Rule 12 [46 C.F.R. 502.12] (“In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.”)
5. *Kontrick v. Ryan*, 540 U.S. 443, 459-60 (2004) (An answer may be amended to include an inadvertently omitted affirmative defense, and even after the time to amend of course has passed, leave to amend shall be freely given when justice so requires).
6. *Forman v. Davis*, 371 U.S. 178, 181-82 (1962) (Pleading is not a game of skill in which one misstep by counsel may be decisive to the outcome. The purpose of pleading is to facilitate a proper decision on the merits. Absent any apparent or declared reason such as undue delay, bad faith, dilatory motive, undue prejudice, or futility of amendment, leave to amend should be freely given.).

F. SPECIFIC AMENDMENTS BEING REQUESTED

If leave is granted, Respondent would amend its original answer as follows:

1. Paragraph IV.A.8 would be amended to delete, “applicable to the shipments in question.”
2. The Affirmative Defenses would be amended to add a fourth that the shipments at issue in this case were Service Contract shipments, not tariff

shipments and therefore do not qualify for freight forwarder compensation.

G. FACTUAL BACKGROUND

1. Claims for freight forwarder compensation are governed by 46 C.F.R. 515.42.
2. Under that Regulation, a common carrier may not pay compensation to a forwarder unless, among other things, it is provided for in the carrier's tariff. Reg. 515.42(b). A forwarder is forbidden from accepting compensation other than what is provided by the tariff. Reg. 515.42(d).
3. When we filed Respondent's answer, we were under the impression that the shipments for which Complainant sought compensation were pursuant to a forwarder compensation tariff incorporated into the relevant Service Contract.
4. We have since learned that the Service Contract did not incorporate that tariff and the tariff does not say that it applies to shipments under a Service Contract. The Service Contract contains a merger clause [Sect. 13] that it supersedes all tariffs not expressly incorporated. The existence of that Service Contract is indisputable as is the fact that the Service Contract contains no provision for freight forwarder compensation. It is Respondent's position that none of its tariffs provide for compensation for non-tariff/Service Contract shipments. Those facts would establish a defense to Complainant's claim.

5. The amendment should be granted for the following reasons.
- (a) Complainant will suffer no prejudice. No rights or claims over have become time barred or been otherwise lost since the original answer was filed, nor have any relevant witnesses become unavailable as a result.
 - (b) The proposed affirmative defense was referred to in Respondent's Answer to Complainant's Request for Admissions served in April of this year. Answer 3 says in part:

... the shipments in question were not shipped pursuant to any tariff or tariff rates but were shipped pursuant to a Service Contract between Respondent and Ford Motor Company
 - (c) There will be no need for additional documentary discovery. Each of the shipments generated a finite set of documents, and these documents—or representative samples—have already been produced.
 - (e) The amendment will simply allow an alternative theory of defense and conform the allegation of the answer to the known facts.

H. REQUEST FOR RELIEF

Respondent asks that its motion be granted.

Dated: White Plains, NY, August 23, 2016

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By: Paul M. Keane
Paul M. Keane
(Signed with authority by J. De May)

By: Joseph De May, Jr.

Proposed Amended Answer

BEFORE THE U.S. FEDERAL MARITIME COMMISSION

DOCKET NO.: 16-02

D. F. YOUNG, INC.,

1235 Westlakes Drive
Suite 255
Berwyn, PA 19312

COMPLAINANT

v.

NYK LINE (NORTH AMERICA) INC.,

300 Lighting Way
5th Floor
Secaucus, NJ 07094

RESPONDENT

AMENDED VERIFIED ANSWER

Paul M. Keane
Joseph De May, Jr.
Cichanowicz Callan Keane & De May, LLP
50 Main Street, Suite 1045
White Plains, NY 10606
(212) 344-7042
Attorneys for Respondent

Respondent, NYK LINE (NORTH AMERICA) INC. ("Respondent"), files this Amended Verified Answer to the Verified Complaint of Complainant, D. F. YOUNG, INC., and alleges as follows:

I. COMPLAINANT

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 1.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 2.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 3.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 4.

II. RESPONDENT

5. Admits the allegations of para. 5 except denies that it is organized or exists under the laws of the State of New York.

6. Admits that Nippon Yusen Kaisha is an ocean common carrier (VOCC) as defined and described in 46 U.S.C. §§ 40102(6) and 40102(17), as well as 46 C.F.R. §§ 515.26 and (l), and that Respondent is the U.S. representative of Nippon Yusen Kaisha in North America, and except as so admitted, denies the truth of the allegations of para. 6.

III. JURISDICTION

7. Denies the truth of the allegations of para. 7.

IV. STATEMENT OF FACTS AND MATTERS COMPLAINED OF

A. TARIFFS

8. Admits that Respondent had in effect its Tariff NYKS-156 and except as so admitted denies the truth of the allegations of para. 8.

9. Denies the truth of the allegation of para. 9 and specifically denies that the language quoted therein was ever in NYK Tariff NYKS-156.

10. Denies the truth of the allegation of para. 10 and specifically denies that the language quoted therein was ever in NYK Tariff NYKS-156.

11. Denies the truth of the allegation of para. 11 and specifically denies that the language quoted therein was ever in NYK Tariff NYKS-156.

B. COMPLAINANT FREIGHT FORWARDING

12. Denies the truth of the allegations of para. 12.

13. Admits that on or about April 2, 2015, Complainant and Respondent entered into an agreement to allow Complainant on behalf of Ford to print bills of lading remotely and except as so admitted denies the truth of the allegations of para. 13; and specifically denies that "transportation of shipments from Ford" was to be "by Complainant."

14. Admits that there were negotiations in regard to the Agreement and further admits that the Agreement sets forth the complete understanding of the parties, and except as so admitted denies the truth of the allegations of para. 14 and specifically denies that Respondent ever agreed to pay Complainant brokerage or freight forwarder compensation.

15. Admits that the Agreement included a clause which stated inter alia “this Agreement sets forth the complete understanding and agreement of the parties and can be amended only in writing signed by the party against whom enforcement is sought.”

Except as so admitted denies the truth of the allegations of para. 15.

16. Denies the truth of the allegations of para. 16 and specifically denies that Complainant performed any freight forwarding services on behalf of Respondent.

17. Admits that Complainant remotely printed bills of lading related to the 4 shipments on behalf of Ford and accept as so admitted denies the truth of the allegations of para. 17.

18. Denies knowledge or information sufficient to form a belief as to the truth of allegations of para. 18.

19. Denies knowledge or information sufficient to form a belief as to the truth of allegations of para. 19.

20. Denies the truth of the allegations of para. 20 and specifically denies that the Complainant performed any freight forwarding services on behalf of Respondent in regard to the Ford shipments.

21. Denies the truth of the allegations of para. 21.

22. Admits that Respondent has provided no compensation to Complainant for freight forwarding services and except as so admitted denies the truth of the allegations of para. 22; and specifically denies that Complainant performed any freight forwarding services on behalf of Respondent.

C. DEMAND FOR COMPENSATION

First Demand for Compensation

23. Admits that on or about September 24, 2015, Complainant, through its counsel, served Respondent with a Demand ("The First Demand") for freight forwarding compensation in the amount of \$129,592.28 plus 1.25% of any accessorial charges, port charges, heavy lift and long length charges, origin receiving charges, destination delivery charges, rental fee and/or surcharges related to certain Ford shipments placed on Respondent's vessel pursuant to the terms of Rule 9 of Respondent's applicable tariff, 46 C.F.R §§ 515.41 515.42 and 46 U.S.C §§ 40904 and 41102 et seq., and except as so admitted denies the truth of the allegations of para. 22; and specifically denies that Complainant was entitled to such freight forwarding compensation.

24. Admits that a Certification by Denise Traynor was enclosed with the First Demand and except as so admitted denies the truth of the allegations of para. 24; and specifically denies that Complainant was entitled to freight forwarding compensation.

25. Admits that with the First Demand was Complainant's F.M.C. Ocean Transportation Intermediary/Ocean Freight Forwarder License and except as so admitted denies the truth of the allegations of para. 25; and specifically denies that Complaint was entitled to freight forwarder compensation.

26. Admits that a copy of Complainant's License for Customhouse Broker from the U.S. Treasury Department, Bureau of Customs was enclosed with the First Demand and except as so admitted denies the truth of the allegations of para. 26; and specifically denies that Complainant is entitled to freight forwarding compensation.

27. Admits that copies of individual bills of lading for shipments for which complainant sought compensation along with reference charts for each shipment and a

separate summary of the applicable total charges and freight forwarding charges for those bills of lading was enclosed with the First Demand and except as so admitted denies the truth of the allegations of para. 27; and specifically denies that Complainant was entitled to freight forwarding compensation.

28. Admits the truth of the allegations of para. 28.

Second Demand for Compensation

29. Admits that a Second Demand for Compensation was made by Complainant on or about December 22, 2015 and except as so admitted denies the truth of the allegations of para. 29; and specifically denies that Complainant was entitled to freight forwarding compensation.

30. Admits that the Second Demand included the previously demanded sum of \$129,592.28 and subsequent alleged freight forwarding charges in the amount of \$73,588.58 for a total of \$203,180.86 together with 1.25% of any accessorial charges, port charges, heavy lift and long length charges, origin receiving charges, destination delivery charges, rental fee and/or surcharges related to certain Ford shipments placed on Respondent's vessel not referenced in plaintiff's First Demand and except as so admitted denies the truth of the allegations of para. 30; and specifically denies that Complainant is entitled to such freight forwarding compensation since it did not perform freight forwarding services on behalf of Respondent.

31. Admits that all additional shipments for which freight forwarder compensation was sought in the Second Demand took place within 6 months of the service of the Second Demand and except as so admitted denies the truth of the allegations of para. 31; and specifically denies that Complainant is entitled to freight

forwarder compensation since it did not perform freight forwarding services on behalf of Respondent.

32. Admits that a Certification by Denise Traynor was enclosed with the Second Demand and except as so admitted denies the truth of the allegations of para. 27; and specifically denies that Complainant was entitled to freight forwarding compensation.

33. Admits that with the Second Demand was Complainant's F.M.C. Ocean Transportation Intermediary/Ocean Freight Forwarder and except as so admitted denies the truth of the allegations of para. 33; and specifically denies that Complaint was entitled to freight forwarder compensation.

34. Admits that copies of individual bills of lading for shipments for which Complainant sought compensation along with reference charts for each shipment and a separate summary of the applicable total charges and freight forwarding charges for those bills of lading was enclosed with the Second Demand and except as so admitted denies the truth of the allegations of para. 27; and specifically denies that Complainant was entitled to freight forwarding compensation.

Third Demand for Compensation

35. Admits that a Third Demand for Compensation was made by Complainant on or about January 13, 2016 and except as so admitted denies the truth of the allegations of para. 35; and specifically denies that Complainant was entitled to freight forwarding compensation.

36. Admits that the Third Demand included the previously demanded sum of \$203,180.86 and subsequent alleged freight forwarding charges in the amount of

\$49,596.03 for a total of \$252,776.89 together with 1.25% of any accessorial charges, port charges, heavy lift and long length charges, origin receiving charges, destination delivery charges, rental fee and/or surcharges related to certain Ford shipments placed on Respondent's vessel not referenced in plaintiff's First or Second Demand and except as so admitted denies the truth of the allegations of para. 36; and specifically denies that Complainant is entitled to such freight forwarding compensation since it did not perform freight forwarding services on behalf of Respondent.

37. Admits that all additional shipment which freight forwarder compensation was sought in the Third Demand took place within 6 months of the service of the Third Demand and except as so admitted denies the truth of the allegations of para. 37; and specifically denies that Complainant is entitled to freight forwarder compensation since it did not perform freight forwarding services on behalf of Respondent.

38. Admits that a Certification by Denise Traynor was enclosed with the Third Demand and except as so admitted denies the truth of the allegations of para. 38; and specifically denies that Complainant was entitled to freight forwarding compensation.

39. Admits that with the Third Demand was Complainant's F.M.C. Ocean Transportation Intermediary/Ocean Freight Forwarder and except as so admitted denies the truth of the allegations of para. 39 and specifically denies that Complaint was entitled to freight forwarder compensation.

40. Admits that copies of individual bills of lading for shipments for which Complainant sought compensation along with reference charts for each shipment and a separate summary of the applicable total charges and freight forwarding charges for those bills of lading was enclosed with the Third Demand and except as so admitted

denies the truth of the allegations of para. 40 and specifically denies that Complainant was entitled to freight forwarding compensation.

41. Admits the truth of the allegations of para. 41 but specifically denies that Complainant was entitled to freight forwarding compensation.

V. STATEMENT OF VIOLATIONS

42. Admits the truth of the allegations of para. 42 except denies that it violated the statute.

43. Admits the truth of the allegations of para. 43 except denies that it violated the statute.

44. Admits the truth of the allegations of para. 44 except denies that it violated the statute.

45. Admits the truth of the allegations of para. 45 except denies that it violated the regulation.

46. Admits the truth of the allegations of para. 46 except denies that it violated the statute.

47. Admits that it has refused to compensate the Complainant and except as so admitted denies the truth of the allegations of para. 47; and specifically denies that Complainant performed any freight forwarding service, that it was entitled to freight forwarding compensation, and that it violated the statute or regulation.

VI. DAMAGES

48. Denies the truth of the allegations of para. 48.

49. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 49.

50. Denies the truth of the allegations of para. 50.

51. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of para. 51.

VII. PRAYER FOR RELIEF

52. Admits that ADR procedures were not used prior to filing of the Complaint and except as so admitted denies the truth of the allegations of para. 52.

53. Denies the truth of the allegations of para. 53.

54. Denies the truth of the allegations of para. 54.

55. Denies the truth of the allegations of para. 55.

56. Denies the truth of the allegations of para. 56.

57. Respondent requests that a hearing in this matter be held in the Metropolitan New York area, or alternatively, in Washington, D.C.

58. Denies the truth of the allegations of para. 58.

VIII. AFFIRMATIVE DEFENSES

First: The Complainant did not perform any freight forwarding services and is not entitled to any of the compensation it claims.

Second. The compensation claimed by Complainant would unjustly enrich it since Complainant performed no freight forwarding services.

Third: The compensation claimed by complainant is unsupported by consideration since Complainant performed no freight forwarding services.

Fourth: The shipments at issue in this case were Service Contract shipments, not tariff shipments and therefore do not qualify for freight forwarder compensation under 46 CFR 515.42 or otherwise. The Service Contract did not provide for freight forwarder compensation and neither incorporated nor was governed by any tariff provision providing for freight forwarder compensation.

Respondent asks that verified complaint be dismissed and that it be awarded its costs and disbursements incurred in the defense of this case.

Dated: White Plains, NY, August ____, 2016

Respectfully Submitted,
CICHANOWICZ CALLAN KEANE & D e MAY, LLP
50 Main Street, Rm. 1045, White Plains, NY 10606
Tel: (212) 344-7042 | Email: pkeane@cckd-ny.com
Attorneys for Respondent

By: _____
Paul M. Keane

VERIFICATION

STATE OF NEW JERSEY, COUNTY OF HUDSON, SS.:

John Grbbuc, being duly sworn, deposes and says:

I am the Senior Director of Ro-Ro Trade for Respondent, NYK Line (North America) Inc. I have read the foregoing answer and know its contents. The same is true and correct to the best of my knowledge. As to those matters stated to be alleged on information and belief, I believe them to be true based upon facts, records, and/or other pertinent information in Respondent's files.

John Grbic

Subscribed and sworn to

Before me on August ____, 2016